RARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
MAR 4 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

No. 278

October Term, 1959

HARRY NEEDELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER

HILTON R. CARR, JR.,
HERBERT A. WARREN, JR. &
A. C. DRESSLER
1408 Ainsley Building
Miami 32, Florida
Attorneys for Petitioner

SUBJECT INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
QUESTIONS PRESENTED	2-4
STATEMENT OF THE CASE	4-7
SUMMARY OF ARGUMENT	7-8
ARGUMENT	
QUESTION 1.	
1. The specific wording of 18 U.S.C. §3500 encompasses statements of government agents called as witnesses	10-13
2. It was the legislative intent of Congress that 18 U.S.C. §3500 should encompass statements of government agents called as witnesses	13
3. Decisions of Circuit Courts of Appeals in cases decided since Palermo v. United States	14-18
4. 18 U.S.C. §3500 is not restricted to formal statements which would be admissible into evidence	18-20

SUBJECT INDEX (cont.)

	Page
5. The error of the trial court cannot be characterized as harmless error	20-21
QUESTION 2	
1. Jencks v. United States overruled Goldman v. United States	22-23
2. Production of relevant notes or statements of a government witness is a matter of right	23-24
QUESTION 3	
1. Denial by trial court of production without examination of notes sought to be produced denied to petitioner his minimal rights under Sixth Amendment	25-28
CONCLUSION	28
APPENDIX A - 18 U.S.C. §3500	App. 1-3
APPENDIX B - Amendment VI - Constitution of the United States	App. 4

AUTHORITIES

	Page
Bradford v. United States, 9th Cir., 271 F. 2d 58	15, 21, 23
Goldman v. United States, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322	22, 24
Holmes v. United States, 4th Cir., 271 F. 2d 635	15, 21
Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed 2d 1103	22, 24
Johnson v. United States, 10th Cir., 269 F. 2d 72	14
Lev v. United States, 360 U.S. 470, 79 S. Ct. 1431, 3 L. Ed. 2d 1531	11
McGill v. United States, C.A.D.C. 270 F. 2d 329	14
National Labor Relations Board v. Adhesive Products Corporation, 258 F. 2d 403	23
Palermo v. United States, 360 U.S. 343, 79 S. Ct. 1217, 3 L. Ed 2d 1287	12, 13, 19
Rosenberg v. United States, 360 U.S. 367, 79 S. Ct. 1231, 3 L. Ed. 2d 1304	20
Rubin v. United States, 360 U.S. 470, 79 S. Ct. 1431, 3 L. Ed 2d 1531	11
Schneiderman v. United States, 106 F. Supp. 731	26
Wool v. United States, 360 U.S. 470, 79 S. Ct. 1431, 3 L. Ed. 2d 1531	11

AUTHORITIES (cont.)

Page

FEDERAL STATUTES

18 U.S.C. §3500 ..... 10, 11

CONSTITUTIONAL PROVISION

Amendment VI, United States Constitution 26

MISCELLANEOUS

27 Law Week, page 3308 12

Supreme Court of the United States

No. 278

October Term, 1959

HARRY NEEDELMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R-146-153) is reported at 261 F. 2d 802. No written opinion was delivered in the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1958 (R-153). An Order denying petition for rehearing was entered by the Court of Appeals on July 6, 1959 (R-157). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1). Certiorari was granted by this Court on October 12, 1959 (R-157).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in this case are as follows:

1. 18 U.S.C. §3500, as set forth hereinafter in Appendix A, page App. 1.

2. The Sixth Amendment to the Constitution of the United States, as set forth hereinafter in Appendix B, page App. 4.

QUESTIONS PRESENTED

1. WHERE A DEFENDANT IN A CRIMINAL PROSECUTION, AT THE BEGINNING OF THE TRIAL AND ALSO WHILE A GOVERNMENT AGENT IS ON THE WITNESS STAND, MOVES FOR THE PRODUCTION AND INSPECTION OF THE NOTES AND MEMORANDA MADE BY SUCH GOVERNMENT AGENT CONTEMPORANEOUSLY WITH HIS INVESTIGATION AND USED BY SUCH GOV-

ERNMENT AGENT BEFORE TESTIFYING, TO REFRESH HIS RECOLLECTION, DOES THE DENIAL BY THE TRIAL COURT OF THE DEFENDANT'S MOTION WITHOUT AN INSPECTION BY THE TRIAL COURT OF SUCH NOTES AND MEMORANDA CONSTITUTE A PREJUDICIAL DENIAL TO DEFENDANT OF THE PROCEDURES PROVIDED FOR IN 18 U.S.C. §3500?

2. WHETHER THE RULE ANNOUNCED BY THIS COURT IN **GOLDMAN V. U. S., 1942, 316 U. S. 129, 132, 62 S. CT. 993, 995, 86 L. ED. 1322**; TO THE EFFECT THAT A TRIAL JUDGE HAS THE DISCRETION TO DENY A DEFENDANT IN A CRIMINAL PROSECUTION THE RIGHT TO INSPECT NOTES AND MEMORANDA MADE BY A GOVERNMENT AGENT DURING HIS INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT TO REFRESH HIS RECOLLECTION BEFORE TESTIFYING AS A WITNESS FOR THE GOVERNMENT, HAS BEEN OVERRULED BY THIS COURT IN **JENCKS V. U. S., 1957, 353 U. S. 657, 77 S. CT. 1007, 1 L. ED. 2d 1103**, and BY THE STATUTE, 18 U.S.C. §3500.

3. WHETHER, WHEN A DEFENDANT IN A CRIMINAL PROSECUTION MOVES, WHILE A GOVERNMENT AGENT IS ON THE WITNESS STAND, FOR THE PRODUCTION AND INSPECTION OF THE NOTES AND MEMORANDA MADE BY SUCH GOVERNMENT AGENT CONTEMPORANEOUSLY WITH HIS

INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT BEFORE TESTIFYING TO REFRESH HIS RECOLLECTION, DOES THE DENIAL BY THE TRIAL COURT OF THE DEFENDANT'S MOTION UPON THE SOLE BASIS THAT SUCH NOTES "MAY" INVOLVE MANY THINGS CONSTITUTE A DENIAL TO THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS BEHALF UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, PARTICULARLY WHERE THE TRIAL COURT RECOGNIZES THAT THE GOVERNMENT'S CASE IS A "VERY SLENDER CASE."

STATEMENT OF THE CASE

The petitioner, a physician, and a druggist were first tried on an indictment for conspiracy to violate 26 U.S.C. 4705(a). A mistrial resulted. Subsequently, another indictment was returned against the petitioner alone charging him with substantive violations of 26 U.S.C. 4705(a). (R-2-8). The two cases were consolidated for trial (R-9).

After the mistrial on the conspiracy charge but prior to the consolidated trial the petitioner moved the Court:

> "... for an Order permitting them to inspect the books, papers, documents, memoranda and objects and particularly the contemporaneous notes made by the Government witness, Kenneth Rudd, who had previously testified in said cause

> and who is a material witness for the Government in said cause, made by the said Kenneth Rudd during his investigation and preparation for trial of said cause, and which said contemporaneous notes have already been referred to by the said Rudd in the previous trial of said cause, and by which testimony it was shown that said contemporaneous notes prepared by the said Rudd were of the events, activities related to his said testimony, and that the inspection and copying of said contemporaneous notes made by the said Rudd are material and necessary for the defendants to prepare their defense." (R-8-9).

The motion was granted only to the extent of permitting inspection of any document or material taken from the defendants (R-9). Again, after the narcotic agent, Rudd, had testified at the consolidated trial on direct examination, had been cross-examined by petitioner's counsel and had testified further on re-direct examination by the government, a short recess was had and the Court ruled:

> "I will deny the request for the notes because they may involve many things. You may see the case report." (R-93).

Shortly prior to such ruling by the Court, Agent Rudd had testified on cross-examination as follows: (R-88)

> "Q. You made copious notes, did you not, at the time you started the investigation of this case?
> A. I made several notes, yes, sir.

> Q. And you have refreshed your recollection from the notes that you made, refreshed your memory? Before coming to testify you refreshed your memory by reference to those notes, did you not?
> A. Yes, sir.

The narcotic agent Rudd testified as to conversations with the petitioner wherein the petitioner stated, according to Rudd, that the petitioner knew that certain patients who obtained prescriptions for narcotics were narcotic addicts (R-57). The petitioner denied making any such statements (R-122).

At the close of the government's case a motion for judgment of acquittal was granted as to both defendants on the conspiracy charge (R-11), but petitioner's motion for judgment of acquittal on the substantive charges was denied. At the conclusion of all the evidence the petitioner again moved for judgment of acquittal, which motion was denied by the trial court with the statement:

> "I think this a very slender case, off-hand, but I think there is enough to go to the jury." (R-137-138).

The jury returned a verdict of guilty as to each of the fifteen substantive counts (R-12). The trial court thereafter granted a motion for new trial as to five counts of the indictment and those counts, upon motion of the government, were dismissed by the court (R-15). The court fined the petitioner the total of $5,000 and placed him on probation for three years (R-14-15).

The petitioner filed his notice of appeal from the judgment of conviction in the Court of Appeals for the Fifth Circuit (R-19). On November 14, 1958 the Court of Appeals for the Fifth Circuit affirmed the judgment of conviction (R-153). Circuit Judge Rives wrote the opinion which was concurred in by Circuit Judges Tuttle and Jones (R-146-153). A petition for rehearing was denied on July 6, 1959 (R-154). Certiorari was granted by this Court on October 12, 1959 (R-157).

SUMMARY OF ARGUMENT

Notes made by a government agent during the course of his investigation constitute a "statement" under 18 U.S.C. §3500(e) and, if the agent testifies, must be produced for inspection upon demand of defense counsel. When the government agent testifies, the requirements of 18 U.S.C. §3500 (b) are fulfilled. The requirements of subsection (e) are met in that the notes are written by the agent and constitute his own document, adopted and approved by him.

It was the legislative intent that statements of government agents be covered by 18 U.S.C. §3500. Otherwise, the protections afforded to the government by 18 U.S.C. §3500 would be limited to statements made to government agents, leaving the statements of the agents themselves to be produced without limitation or restriction.

In cases decided by Circuit Courts of Appeals since **Palermo v. United States**, two circuits have denied production of agent's notes upon authority of **Palermo v. United States**. Two other circuits have, however, held such denial to be error, pointing out that nothing in Pa-

lermo v. United States or **18 U.S.C. §3500** suggests that notes of an agent who testifies are not producible.

Formality of the statement and its admissibility into evidence are not determinative of whether such statement is producible under **18 U.S.C. §3500.**

The error of the trial court in the instant case cannot be deemed harmless error. The notes sought to be produced were not examined by the trial court and were not preserved for review. The Court cannot say, as in **Rosenberg v. United States**, that defense counsel was possessed of the same information as he would have been had error not been committed.

Jencks v. United States overruled **Goldman v. United States.** The production of relevant notes of a government agent who testifies is not a matter of discretion with the trial court. The defense is entitled to production of all relevant statements of any government witness. **18 U.S.C. §3500** merely provides a procedure whereby the trial court determines the relevancy of the statement.

The Sixth Amendment has always afforded to defendants the very minimal right to have the trial court inspect the statement sought to be produced and weigh the respective interests of the defendant and the government. This minimal right was denied to petitioner.

ARGUMENT

The decision of the Court of Appeal for the Fifth Circuit in the instant case was:

1. That contemporaneous notes and memoranda prepared by a government agent during the course of his investigation and used by him before testifying to refresh his recollection are not within the scope of **18 U.S.C. §3500.**

2. That the rule of **Goldman v. United States, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322,** to the effect that it is discretionary with the trial court to require or not to require a witness to produce contemporaneous memoranda or notes from which he had refreshed his recollection before taking the stand was not overruled by **Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103.**

3. That there was no abuse of discretion by the trial court in denying permission to examine such notes and memoranda of the government agent.

QUESTION I

WHERE A DEFENDANT IN A CRIMINAL PROSECUTION, AT THE BEGINNING OF THE TRIAL AND ALSO WHILE A GOVERNMENT AGENT IS ON THE WITNESS STAND, MOVES FOR THE PRODUCTION AND INSPECTION OF THE NOTES AND MEMORANDA MADE BY SUCH GOVERNMENT AGENT CONTEMPORANEOUSLY WITH HIS INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT BEFORE TESTIFYING, TO REFRESH HIS RECOLLECTION, DOES THE DENIAL BY THE TRIAL COURT OF THE DEFENDANT'S MOTION WITHOUT AN INSPECTION BY THE TRIAL COURT OF

SUCH NOTES AND MEMORANDA CONSTITUTE A PREJUDICIAL DENIAL TO DEFENDANT OF THE PROCEDURES PROVIDED FOR IN 18 USC §3500?

The Court of Appeals for the Fifth Circuit has decided in the instant case that contemporaneous notes and memoranda made by a government agent during the course of his investigation and used by him to refresh his recollection before testifying are not within the scope of **18 U.S.C. §3500.** The petitioner respectfully submits that such decision is manifestly contrary to the specific wording and intent of **18 U.S.C. §3500.**

1. The specific wording of 18 U.S.C. §3500 encompasses statements of Government agents called as witnesses.

Sub-section (a), **18 U.S.C. §3500** deals solely with statements made by a government witness to a government agent, which situation is not present in the case at bar. However, sub-section (b) of **18 U.S.C. §3500,** does cover the situation of the case at bar, that is, where the government agent is the witness who is testifying. Subsection (b) provides:

> "(b) After a witness, called by the United States, has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. . . ."

The government Agent, Rudd, was called as a witness by the United States in the instant case. He had testified on direct, cross, and re-direct when the trial judge denied petitioner's request for production of his contemporaneous notes and memoranda. The only remaining question is whether the notes and memoranda of Rudd constituted a "statement" under the definition contained in sub-section (e) of **18 U.S.C. §3500.** Sub-section (e) of 18 U.S.C. §3500 provides:

> "(e) The term 'statement' . . . means (1) a written statement made by said witness and signed or otherwise adopted or approved by him."

The notes and memoranda of Rudd met all the requirements of sub-section (e) (1). The notes were written, were made by the witness, and were further adopted or approved by him by the very act of using such notes to refresh his recollection before testifying concerning the events which he recorded in his notes. The petitioner submits that the notes and memoranda of Rudd met every requirement of **18 U.S.C. §3500** and that the determination by the Court of Appeals that such notes are not within the scope of **18 U.S.C. §3500** cannot be upheld.

The production of notes of a government agent in a situation similar to the case at bar was discussed during oral arguments before this Court in the case of **Lev v. United States. Wool v. United States, and Rubin v. United States, 360 U.S. 470, 79 S.Ct. 1431, 3 L.Ed. 2d 1531.** A portion of the discussion between various members of this Court and Mr. Oscar Davis, First Assistant to the Solicitor General, as reported in 27 Law Week at page 3308, was as follows:

"In many instances, the Assistant to the Solicitor General continued, the face of the document shows it is not producible. There may be a three-hour interview with a fifty-line summary.

"Mr. Justice Brennan: 'Suppose here there had been a statement "I talked with Carlin, but he denied knowledge of this transaction," and subsequently the witness testified. Would that be producible?'"

"Mr. Davis: 'No.'

"Mr. Davis asserted that counsel could cross-examine the witness as to what he said or cross-examine the agent.

"Mr. Justice Black: 'Suppose the agent denies it?'

"Mr. Davis: **'Then the memoranda could be produced, since it was the agent's own document and would be producible.'"** (emphasis added)

The statement made by the First Assistant to the Solicitor General is precisely the contention of the petitioner. In the case at bar the memoranda was the agent Rudd's own document and was producible. Rudd prepared the memoranda. Rudd used the memoranda to refresh his recollection. It was his own document and could properly be used to impeach his testimony. The letter, as well as the intent, of **18 U.S.C. §3500** requires production of such memoranda. In argument upon **Palermo v. United States, 360 U.S. 343, 79 S. Ct. 1217, 3 L. Ed. 2d 1287,** government

counsel again suggested the remedy of calling the interviewing agent, apparently as a means of obtaining production of the agent's memoranda of an interview with a witness (see footnote (1) to the concurring opinion of Mr. Justice Brennan). The petitioner cannot improve upon the clarity and brevity of the statement attributed to Mr. Davis, " . . . it was the agent's own document and would be producible."

2. It was the legislative intent of Congress that 18 U.S.C. §3500 should encompass statements of government agents called as witnesses.

It cannot be argued that **18 U.S.C. §3500** is to be limited solely to statements made by government witnesses to government agents and excludes from its scope the prior statements of government agents who testify as witnesses. As this Court pointed out in **Palermo v. United States, supra,**

> "The Act's major concern is with limiting and regulating defense access to government papers. . ." (360 U.S. at 354)

To say that the act limits and regulates defense access to government papers where statements to government agents are concerned but places no limitations or regulations where the statements of government agents themselves are concerned is to restrict the act in manner obviously not within the intention of Congress. The petitioner submits that there can be no doubt but that statements of government agents who testify as witnesses are within the specific wording, as well as the legislative intention, of **18 U.S.C. §3500.**

3. Decisions of Circuit Courts of Appeals in cases decided since Palermo v. United States.

Since the filing of the petition for certiorari in this case, the question of the production of memoranda and reports of government agents who testify as government witnesses has been considered by four Courts of Appeals.

In **Johnson v. United States, 10th Cir., 269 F. 2d 72,** the defendant complained that the trial court refused to require the government to produce a memorandum prepared by a special agent who testified as a witness. This witness testified that he made no notes at the time of the first interview with the defendant; that after the first interview and before the second, he prepared a memorandum which related to the interview; that he prepared a written statement to be signed by the defendant and which was signed by the defendant at the second interview; that the memoranda contained some statements made by the defendant which were not in the written statement. The Court of Appeals for the Tenth Circuit held that the memorandum prepared by the witness was his interpretations and impressions, and thus not a statement within the intendment and meaning of **18 U.S.C. §3500. Palermo v. United States** was cited as authority for such holding.

In **McGill v. United States, C.A.D.C. 270 F. 2d 329,** the defendant sought production of the notes of a police officer, which notes were made on the case by the police officer and used by him to refresh his recollection prior to coming to court. The trial court ruled that if the officer referred to the notes on the witness stand, counsel

would be entitled to look at the notes, but that counsel could not require production of the notes if the witness simply used the notes to refresh his recollection before coming to court. The Court of Appeals affirmed, stating that 18 U.S.C. §3500 governed and that the notes demanded were not required to be produced under the terms of the statute. **Palermo v. United States** was cited as authority for such decision.

In **Bradford v. United States, 9th Cir., 271 F. 2d 58,** production was sought of the notes of a government agent who testified as a witness. The notes were made by the agent during the course of investigation and used by the agent to refresh his recollection before testifying. The trial court examined the notes *in camera* and determined that no inconsistencies existed between the notes and the testimony of the witness. The notes were returned to the witness and not preserved for appellate review. The action of the trial court was taken before the decision in **Jencks v. United States, 353 U.S. 657, 775. Ct. 1007, 1L. Ed. 2d of 103.** The Court of Appeals, applying the **Jencks** case and not the statute, held the trial court to be in error in denying the defendant the right to inspect the notes and ordered a new trial. The Court of Appeals noted that on a retrial the procedures set out in 18 U.S.C. §3500 would be followed.

In **Holmes v. United States, 4th Cir., 271 F. 2d 635,** one of the principal witnesses for the government was an F.B.I. agent who testified at length about his investigation and conversations he had with the defendants. The defense demanded production of the memoranda and reports of the agent. The prosecution claimed that the files contained irrelevant matter which should not be

disclosed. The file was tendered to the trial judge so that he might excise the irrelevant portions. The trial judge declined to read the reports and, instead, the F.B.I. agents themselves extracted certain portions which were delivered to the defense. The Court of Appeals reversed the conviction of the defendant holding that 18 U.S.C. §3500 places upon the trial judge the affirmative duty of inspecting *in camera* a statement which the prosecution contends contains unrelated matter and that the court, itself, excise the unrelated matter. The Government contended that the Jencks Act (18 U.S.C. §3500) does not apply to statements prepared by a government agent who becomes a witness at the trial. The Court of Appeals ruled:

(1) The rule of the **Jencks** case would require that all of the F.B.I. files be delivered to defense counsel for determination as to the portions wished to be used in cross-examination.

(2) The secrecy of confidential unrelated material in the file can be protected by applying the procedures of the Act.

(3) Nothing in the Jencks Act suggests that defense counsel are entitled to no statements of the witness, simply because he happens to be an F.B.I. agent.

(4) The use of an agent's memoranda and reports to contradict the agent who prepared the same in no way contravenes the policy of the Act against the use of an investigator's notes or summaries to contradict his informer.

(5) Nothing in **Palermo v. United States, supra,** suggests that a summary made by an agent would not be a "statement" within the meaning of subsection (e) of the Act when its use is sought to cross-examine the agent who prepared it.

(6) Inasmuch as the trial court did not examine the file to determine what was withheld, it could not be said that all relevant material was delivered to defense counsel and therefore the error could not be characterized as harmless error.

The petitioner submits that the decisions of the Court of Appeals for the Ninth Circuit in **Bradford v. United States, supra,** and of the Court of Appeals for the Fourth Circuit in **Holmes v. United States, supra,** correctly interpret the holding and spirit of **Jencks v. United States** as well as the letter and purpose of **18 U.S.C. §3500. Jencks v. United States** makes it clear that once a government witness takes the stand, be he agent or not, his reports, statements, memoranda and all documents of which he is the author are producible if relevant to his testimony. The statute merely provides a procedure whereby the government may obtain an *in camera* determination, and excision, by the court of the irrelevant portions.

The petitioner respectfully submits that the interpretation of **Palermo v. United States** by the Court of Appeals for the Tenth Circuit in **Johnson v. United States, supra,** was erroneous, as was the interpretation by the Court of Appeals for the District of Columbia in **McGill v. United States, supra. Palermo v. United States** did not involve a case where the agent who prepared the memorandum was the witness, as was the case in **Johnson v.**

United States. Likewise, **Palermo v. United States** did not pass upon a situation such as presented in **McGill v. United States** and there is nothing in **Palermo** which even suggests that the notes of a police officer would not be a "statement" of such police officer when its use is sought in order to cross-examine such police officer. **Palermo** holds simply that only those statements which could properly be called the witness' own words should be made available to the defense for the purposes of impeachment. By the same reasoning, if the statement can properly be called the witness' own words, it is producible.

4. 18 U.S.C. §3500 is not restricted to formal statements which would be admissible in evidence.

The Court of Appeals for the Fifth Circuit, in the instant case, placed a highly restrictive interpretation upon **18 U.S.C. §3500.** The court, in deciding that notes and memoranda prepared by a government agent contemporaneously with his investigation and used by him to refresh his recollection before testifying are not within the scope of **18 U.S.C. §3500,** predicated its decision upon two premises, both of which premises this Court rejected in **Palermo v. United States, supra.** The Court of Appeals determined that the notes of Rudd were not within **18 U.S.C. §3500** because:

(1) **18 U.S.C. §3500** relates to formal written statements or reports made by the witness and signed or otherwise adopted or approved by him, and,

(2) such memoranda or notes could not be directly introduced for impeachment purposes, but might be used as a basis for cross-examining the witness.

The **formality** of a written statement is no criteria of whether it should be produced under **18 U.S.C. §3500. As** stated by this Court in **Palermo v. United States, supra:**

> "We find the legislative history persuasive that the statute was meant to encompass more than mere automatic reproductions of oral statements."

Thus, the restriction by the Court of Appeals of 18 **U.S.C. §3500** to **formal** written statements is not in accord with the decision of this Court in **Palermo v. United States, supra.**

Likewise, the admissibility in evidence of a statement sought to be produced is of no importance in determining whether the statement should be produced under 18 U.S.C. §3500. As stated by Mr. Justice Frankfurter in **Palermo v. United States, supra:**

> "The statute governs the production of documents; it does not purport to affect or modify the rules of evidence regarding admissibility and use of statements once produced."

And, as stated by Mr. Justice Brennan in **Palermo v. United States, supra:**

> "The statute is to be given a reasonable construction, and the courts must not lose sight of the fact that the statute regulates **production** of material for possible use in cross examination, and does not regulate **admissibility** into evidence —as the Court properly observes."

It is the belief of the Petitioner that it is abundantly clear that the trial court was in error in not requiring the production of the notes of the witness Rudd. The relevancy of the notes was already established by the testimony of Rudd. The potential aid of the notes in effective cross-examination was enhanced by the fact that Rudd had used such notes to refresh his recollection. The only remaining question is whether the error of the district court in denying production of the notes was prejudicial and requires the granting of a new trial.

5. The error of the trial court cannot be characterized as harmless error.

In **Rosenberg v. United States, 360 U.S. 367, 79 S. Ct. 1231, 3 L. Ed. 2d 1304,** this Court held that the error of the trial court in refusing production of a particular letter was harmless error when the very same information was possessed by defendant's counsel as would have been available were error not committed. In **Rosenberg v. United States, supra,** the letter which was sought to be produced was retained as part of the record so that it could be examined by the appellate court. In the instant case the notes of the agent Rudd were not retained as part of the record. It is impossible to state that defense counsel was possessed of the same information as he would have been had error not been committed in the present case for the simple reason that it is impossible to know what was contained in the notes of Rudd.

In **Bradford v. United States, supra,** the Court of Appeals for the Ninth Circuit was presented with a situation similar to the case at bar in that the notes involved were not preserved in the record to permit review. The court stated, on page 69 of its opinion,

> "We, unlike the Supreme Court in Rosenberg, do not have the notes before us, and are unable to characterize the error as harmless."

In **Holmes v. United States, supra,** the Court of Appeals for the Sixth Circuit likewise pointed out that, unlike the situation in **Rosenberg v. United States, supra,** the Court was unable to characterize the error as harmless. The Court stated:

> "Here it is not contended that the defense had the information contained in the portion of the file which was not produced. It cannot be said all the relevant and related material was delivered to defense counsel, for the district court never examined it to determine what was withheld."

In the case at bar the district court never examined the notes to determine what was withheld or to determine if the information contained in the notes was the same information as provided to the petitioner in the case report. The trial court predicated its denial of production solely upon the basis that the notes "may" involve many things. The notes not having been preserved in the record, it is impossible to characterize the error of the district court as harmless.

QUESTION 2

WHETHER THE RULE ANNOUNCED BY THIS COURT IN **GOLDMAN V. U. S., 1942, 316 U.S. 129, 132, 62 S. Ct. 993, 995, 86 L. Ed. 1322,** TO THE EFFECT THAT A TRIAL JUDGE

HAS THE DISCRETION TO DENY A DEFENDANT IN A CRIMINAL PROSECUTION THE RIGHT TO INSPECT NOTES AND MEMORANDA MADE BY A GOVERNMENT AGENT DURING HIS INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT TO REFRESH HIS RECOLLECTION BEFORE TESTIFYING AS A WITNESS FOR THE GOVERNMENT, HAS BEEN OVERRULED BY THIS COURT IN **JENCKS V. U. S., 1957, 353 U.S. 657, 77 C. Ct. 1007, 1 L. Ed. 2d 1103,** and BY THE STATUTES, **18 U.S.C. §3500.**

The Court of Appeals for the Fifth Circuit ruled in the instant case that the case of **Goldman v. United States, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322,** was not overruled by **Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103,** and that, therefore, it was discretionary with the trial court to require or not to require a witness to produce memoranda or notes from which he had refreshed his recollection before taking the stand.

1. Jencks v. United States overruled Goldman v. United States.

In **Goldman v. United States, supra,** this court ruled that it was discretionary with the trial court to require or not to require a witness to produce memoranda or notes from which he had refreshed his recollection before taking the stand. In **Jencks v. United States, supra,** this court, on page 68 of the opinion, states the holding of **Goldman v. United States, supra,** and then states,

"We now hold that the petitioner was entitled to

> an order directing the government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I. touching the events and activities as to which they testified at the trial."

Subsequent decisions by Circuit Courts of Appeal have taken the position that the rule of **Goldman v. United States was overruled** by **Jencks v. United States.** In **National Labor Relations Board v. Adhesive Products Corporation, 2nd Cir. 258 F. 2d 403,** the Circuit Court considered the question as to whether a statement admittedly used by a witness to refresh his recollection shortly prior to testifying at an administrative hearing must be produced on demand by counsel for the purpose of cross-examination. The Court of Appeals for the Second Circuit, after discussing **Goldman v. United States, supra,** ruled that under **Jencks v. United States, supra,** such statement must be produced.

In **Bradford v. United States, Ninth Circuit, 271 F. 2d 58,** defense counsel sought production of notes of the government agent who was testifying, which notes had been used to refresh his recollection before taking the stand. The Circuit Court applied the **Jencks** case in reaching its decision that the trial court was in error in not requiring production of the notes in question.

2. Production of relevant notes or statements of a government witness is a matter of right.

The fact that the notes of the government witness are used by him to refresh his recollection before taking

the stand is not of primary importance in determining whether such notes must be produced. The governing consideration is whether the notes are relevant to the witness' testimony. The petitioner submits that under **Jencks v. United States** a defendant is entitled to production of any notes or statements of a government witness which are relevant to that witness' testimony. The use or non-use by the witness of such notes or statements to refresh his memory does not affect the producibility of such notes. **Jencks v. United States** enunciates the right of the defendant to such production. 18 U.S.C. §3500 does not curtail such right but only provides the procedural machinery by which the defendant is provided with only that to which he is entitled. **Jencks v. United States**, not **Goldman v. United States**, governs the right of the petitioner to production of the notes. 18 U.S.C. §3500, not **Goldman v. United States**, governs the procedural effectuation of such rights. There is no longer any discretion on the part of the trial judge to deny production if the statement of the witness meets the requirements of **Jencks v. United States** and 18 U.S.C. §3500. Production is a matter of right, not of discretion. The function of the trial judge is to exercise the affirmative duty of determining the relevancy of the statement, if the government protests that the statement contains irrelevant portions. This determination of relevancy is subject to review. There is no discretion to withhold relevant statements.

The petitioner submits that the Circuit Court of Appeals for the Fifth Circuit was in error in the instant case in ruling that **Goldman v. United States** stated the applicable rule of law governing the production of the agent's notes.

QUESTION 3

WHETHER, WHEN A DEFENDANT IN A CRIMINAL PROSECUTION MOVES, WHILE A GOVERNMENT AGENT IS ON THE WITNESS STAND, FOR THE PRODUCTION AND INSPECTION OF THE NOTES AND MEMORANDA MADE BY SUCH GOVERNMENT AGENT CONTEMPORANEOUSLY WITH HIS INVESTIGATION AND USED BY SUCH GOVERNMENT AGENT BEFORE TESTIFYING TO REFRESH HIS RECOLLECTION, DOES THE DENIAL BY THE TRIAL COURT OF THE DEFENDANT'S MOTION UPON THE SOLE BASIS THAT SUCH NOTES "MAY" INVOLVE MANY THINGS CONSTITUTE A DENIAL TO THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS BEHALF UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, PARTICULARLY WHERE THE TRIAL COURT RECOGNIZES THAT THE GOVERNMENT'S CASE IS A "VERY SLENDER CASE."

1. Denial by trial court of production without examination of notes sought to be produced denied to petitioner his minimal rights under the Sixth Amendment.

The trial court denied the motion of the petitioner for production of notes and memoranda made by a government agent during the course of his investigation and used by him to refresh his recollection before testifying.

without any examination by the trial court of the notes and memoranda and solely "because they may involve many things." The Court of Appeals, in ruling that such action by the trial court did not constitute an abuse of discretion, sanctioned a departure from the accepted and usual course of judicial proceedings which endangers the constitutional rights of all defendants in criminal cases.

As stated in United States v. Schneiderman, 106 F. Supp. 731, 735, 736:

> "The court's discretionary power to compel production of a document must be exercised in the light of the requirement of the 6th Amendment that:
>
> 'In all criminal prosecutions, the accused shall enjoy the right. . . to have compulsory process for obtaining witnesses in his favor. . . .' (U. S. Const., Amend. VI). . .
>
> "Proper exercise of judicial discretion in determining whether to compel production requires in every case that any public policy militating against public disclosure of the document be weighed against the interests of the accused in having the document for use in making a defense to the charge."

In exercising their discretionary power in the past, the courts adopted the procedure of an *in camera* inspection of the documents in order to weigh public policy against the interests of the accused (see cases cited in **Jencks v. United States, supra,** at page 676, footnote 4). This procedure was disapproved in **Jencks v. United States, supra.**

The statute, 18 U.S.C. §3500 provided a method for the excising by the trial court of portions of a document which the trial court feels should not be revealed to the defendant. In any event, the courts have even been diligent to preserve constitutional rights of defendants under the Sixth Amendment and to deny production of relevant documents to them only where the possible evidentiary value of the document to the defendant was outweighed by some public policy against disclosure. The discretion exercised by the courts was the discretion of deciding, **after examining the document**, whether the interests of the defendant or the public were paramount.

It is the position of the petitioner that the notes in question are within the scope of 18 U.S.C. §3500 and that, if the government contended that the notes contained irrelevant matter, the procedure therein prescribed should have been followed. But 18 U.S.C. §3500 is at most a procedural method for protecting the interests of the government without infringing the constitutional rights of defendants under the Sixth Amendment. The trial court in the instant case not only did not follow the statutory procedures of 18 U.S.C. §3500 but also denied to the petitioner the minimal right which has always been accorded under the Sixth Amendment; that is, the right to have the trial court, at the very least, order production of the notes for examination by the trial court in order that the trial court might weigh the evidentiary value of the document as against reasons for not disclosing the document in the interests of the public welfare or safety.

The petitioner respectfully submits that the opinion of the Court of Appeals in the instant case cannot be permitted to remain on the law books as precedent for

such a denial to a defendant of all rights under the Sixth Amendment.

CONCLUSION

A defendant is entitled to have produced for his inspection all notes, memoranda and statements of any government witness who takes the stand against him, if such are relevant to the testimony of the witness. If the government contends that such statements contain irrelevant matter, the provisions of 18 U.S.C. §3500 are activated and the trial judge then has the affirmative duty of examining the statement in question and excising the irrelevant portions. The petitioner was entitled to production of the notes of agent Rudd prepared during his investigation. Production was denied by the trial court upon the basis that the notes "may" involve many things. Such action of the trial court cannot be sustained under the ruling of **Jencks v. United States**, nor the provisions of 18 U.S.C. §3500. The error in this case, recognized to be a weak case by the trial court, cannot be characterized as harmless.

The petitioner respectfully submits that the decision of the Circuit Court of Appeal for the Fifth Circuit should be reversed with directions that the cause be remanded to the District Court for a new trial.

Respectfully submitted,

HILTON R. CARR, JR.
HERBERT A. WARREN, JR.
A. C. DRESSLER
1408 Ainsley Building
Miami 32, Florida
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 5 copies of the foregoing Brief of Petitioner were mailed to the Solicitor General, Department of Justice, Washington 25, D. C. this 2 day of March, 1960 by depositing the same in a United States post office with air mail postage prepaid and addressed to the Solicitor General, Department of Justice, Washington 25, D. C.

HILTON R. CARR, JR.
HERBERT A. WARREN, JR.
A. C. DRESSLER
1408 Ainsley Building
Miami 32, Florida
Attorneys for Petitioner

BY Herbert A. Warren Jr.

APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

18 U.S.C. §3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the Court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the Court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not

relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

APPENDIX B

CONSTITUTION OF THE UNITED STATES AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.